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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EVELINE H. BROWNSTEIN,

Plaintiff and Appellant,

v.

DOUGLAS SMITH et al.,

Defendants and Respondents.

B204302

(Los Angeles County
Super. Ct. No. SC084258)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Jacqueline A. Connor, Judge. Affirmed.

Jeffrey L. Licht, for Plaintiff and Appellant.

Challenge Alliance Group, Inc., Barry Khan, for Defendants and Respondents.

INTRODUCTION

Plaintiff Eveline Brownstein appeals from a judgment entered after an order sustaining demurrers by, and granting summary judgment in favor of, defendants Douglas Smith and Bonnie Smith on Brownstein's complaint alleging causes of action for injunctive relief, declaratory relief, trespass, conspiracy to commit private nuisance, breach of fiduciary duty, and unjust enrichment. Brownstein's complaint arose from a dispute between herself and three other owners of units in a condominium building, in which Brownstein alleged that the other owners, including the Smiths, illegally amended the Declaration of Covenants, Conditions, and Restrictions (the CC&R's), committed acts of trespass on Brownstein's property, and created a private nuisance.

In the appeal from the order sustaining the demurrer, Brownstein raises no claim of error concerning the trial court's ruling. Instead Brownstein proposes to amend her causes of action for conspiracy to commit private nuisance. We conclude, however, that Brownstein's proposed amendments fail to state a cause of action either for the tort of private nuisance or for conspiracy to commit private nuisance. We therefore affirm the order sustaining demurrers.

In the appeal from the order granting summary judgment, Brownstein primarily challenges the grant of summary judgment on her cause of action for injunctive relief. Brownstein, however, has not created a triable issue of fact as to whether the Smiths committed acts threatening to cause irreparable injuries, and has not shown she was entitled to injunctive relief because the amendment of the CC&R's illegally violated statutes or provisions of the CC&R's. Brownstein also did not establish that the defendants owed, or breached, a fiduciary duty to Brownstein in voting as a member of the homeowners' association to amend the CC&R's.

We affirm the judgment.

PROCEDURAL HISTORY

On January 28, 2005, plaintiff Eveline Brownstein filed a complaint against Keith Hagaman, Walter Huber, and Deborah Huber. A first amended complaint followed on May 31, 2005. On August 24, 2005, the trial court sustained these defendants' demurrers

to the causes of action for public nuisance and conversion. On March 7, 2006, the plaintiff amended the complaint to name Douglas Smith and Bonnie Smith as defendants. On December 21, 2006, Brownstein filed a second amended complaint, alleging, as against Douglas Smith and Bonnie Smith, causes of action for injunctive relief, declaratory relief, trespass, conspiracy to commit private nuisance, breach of fiduciary duty, and unjust enrichment.

Douglas Smith and Bonnie Smith filed demurrers to the second amended complaint. The record does not contain the demurrers and opposition. On April 5, 2007, the trial court overruled the demurrer as to the first cause of action for injunctive relief, but struck numerous subsections of paragraph 95 of the second amended complaint as improper requests for injunctive relief. The trial court also overruled the demurrer as to the second cause of action for declaratory relief and as to the seventh cause of action for breach of fiduciary duty. The trial court sustained demurrers without leave to amend as to the causes of action for trespass, conspiracy to commit private nuisance, and unjust enrichment.

On May 25, 2007, the Smith defendants moved for summary judgment, or in the alternative for summary adjudication of issues, in the remaining causes of action for injunctive relief, declaratory relief, and breach of fiduciary duty. On September 14, 2007, the trial court granted summary judgment and ordered judgment entered in favor of Douglas Smith and Bonnie Smith.

Brownstein filed a timely notice of appeal.

I. The Appeal From the Order Sustaining Demurrers

FACTS

After presenting proposed amendments to causes of action for trespass and for restitution (unjust enrichment) in her brief on appeal, at oral argument Brownstein's counsel withdrew those proposed amendments. Brownstein having made no other claim of error on appeal as to the sustaining of demurrers to these two causes of action, we omit facts relating to those causes of action.

Pursuant to the standard of review of an order sustaining demurrers,¹ the second amended complaint contained the following allegations as to the Smith defendants. Plaintiff and defendants own units in a four-unit condominium located at 27 Ketch Street in Los Angeles, California. The Huber defendants own Unit 1 and control Air Space A. Defendant Hagaman owns Unit 2 and controls Air Space B. Units 1 and 2 are directly above Air Spaces A and B. The complaint alleged that the City of Los Angeles never approved Air Spaces A and B for occupancy, and that the Hubers and Hagaman modified those two air spaces in a manner that resulted in enforcement procedures being brought by the City of Los Angeles against all unit owners, including Brownstein. Brownstein owns Unit 3. The Smiths own Unit 4.

The complaint alleged that the Hubers and Hagaman illegally installed water heaters, sinks, showers, and toilets in Air Spaces A and B; illegally attempted to connect Air Space A to Unit 1 and Air Space B to Unit 2; cut substantial holes in common area walls and engaged in illegal construction and demolition activities in Air Space B (which Brownstein claimed to own); and that defendants' actions caused the City of Los Angeles to issue an order to comply against all condominium unit owners. The order to comply required the unit owners to cease, demolish and remove all unpermitted construction work, and to restore the condominium to its original approved status, or to submit plans and obtain all required permits. The Hubers and Hagaman refused to comply with the order, resulting in the commencement and maintenance by the City of Los Angeles of enforcement proceedings against all owners, including Brownstein. The Hubers and Hagaman also refused Brownstein access to the area to correct the illegal activity.

¹ A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank -- California* (1994) 27 Cal.App.4th 800, 807.) "Our task in reviewing a judgment of dismissal following the sustaining of . . . a demurrer is to determine whether the complaint states, or can be amended to state, a cause of action. For that purpose we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

On March 3, 2006, Brownstein discovered an emergency notice of a meeting called for March 8, 2006, of the 27 Ketch Street Homeowners Association posted in the building elevator. She also received a notice on her doorstep. The notice included a proposed second amendment to the CC&R's, which purported to grant the right to penetrate ceilings to install lighting fixtures and insulation to Units 1 and 2, but not to Unit 3, Brownstein's unit. The proposed second amendment also purported to grant rights of access to storage closets in the interior of Unit 3, which was Brownstein's exclusive property and was not common area. The proposed second amendment also purported to convert common area into exclusive use, or quasi fee interests, for the benefit of other unit owners, depriving Brownstein of her undivided 25 percent fee interest ownership in that common area, which included storage spaces in the garage, common areas adjacent to Air Spaces A and B, which were being converted to exclusive use patios for the sole benefit of defendants, and common area space between Air Spaces A and B and Units 1 and 2, which defendants sought to penetrate for their exclusive use as a connector between the air spaces and the units above them.

The complaint alleged that a settlement agreement had settled disputes between Hagaman and the Hubers, on the one hand, and the Smiths on the other hand, by authorizing benefits granted to the Hubers and Hagaman in the proposed Second Amendment in exchange for a large monetary payment to the Smiths and dismissal of pending legal actions between these parties. On March 8, 2006, the Hubers, Hagaman, and Mr. Smith, owners of Units 1, 2, and 4, adopted the proposed Second Amendment, which was recorded in Los Angeles County records and constituted a cloud on Brownstein's title to Unit 3 and to her 25 percent tenancy in the common area. At the March 8, 2006, meeting, the Hubers, Hagaman, and the Smiths also agreed on behalf of the 27 Ketch Homeowners Association but without Brownstein's consent, that retired Judge Diane Wayne would resolve all homeowner disputes, thus binding Brownstein to a mandatory arbitration clause without her consent and forcing Brownstein to accept Judge Wayne as arbitrator notwithstanding conflicts of interest and personal bias that would permit Brownstein to disqualify Judge Wayne under California law.

The complaint alleged that the Hubers, Hagaman, and Douglas Smith control three-fourths of the votes of the 27 Ketch Homeowners Association and owe a fiduciary duty to Brownstein, the sole minority owner, which defendants breached by taking actions to further their personal interests and not the interests of the 27 Ketch Homeowners Association or Brownstein.

The conspiracy to commit private nuisance alleged that Hagaman and the Hubers intentionally and unreasonably created a condition which obstructed the free use of the condominium project and interfered with Brownstein's enjoyment of life and property and with Brownstein's use of her ownership interest in the condominium project. The Smiths agreed to assist, and knowingly and intentionally aided and abetted, Hagaman and the Hubers in creating and continuing the private nuisance and in circumventing the law of the City of Los Angeles and the State of California. The Smiths also acted to facilitate the scheme, including voting to spend Homeowners Association funds on a consultant hired to advance their private agenda, to circumvent city and state laws.

ISSUE

Brownstein claims on appeal that the trial court abused its discretion in sustaining a demurrer to the cause of action for conspiracy to commit private nuisance without leave to amend.

DISCUSSION

A. Because Brownstein's Proposed Amendment Does Not Allege the Tort of Private Nuisance, Brownstein Has Not Stated a Cause of Action for Conspiracy to Commit Private Nuisance

The trial court sustained a demurrer to the sixth cause of action against the Smiths for conspiracy to commit private nuisance. Brownstein proposes to amend the complaint to allege that from 2006 to the present, the Smiths knew the Hubers used the air space they own for occupancy and continued to feed hot water from their water heater into that air space surreptitiously to deceive the City of Los Angeles, and that by entering into the settlement agreement and approving occupancy of the air spaces before the City approved it, the Smiths furthered this nuisance and violated City of Los Angeles codes.

To show a private nuisance, “ ‘the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. . . . [¶] . . . “So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.” . . . An interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes . . . and against a sewage treatment plant for interference caused by noxious odors. . . .’ [Citation.]” [¶] “ ‘In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff’s property; proof of interference with the plaintiff’s use and enjoyment of that property is sufficient. . . . In further distinction to trespass, however, liability for private nuisance requires proof of two additional elements. . . .’ ” (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302.) First, the plaintiff must prove that the invasion of plaintiff’s interest in her use and enjoyment of the land was substantial in that it caused plaintiff to suffer substantial actual damage, defined as “ ‘harm of importance,’ ” an invasion of plaintiff’s interests that is “ ‘real and appreciable’ ” and “ ‘definitely offensive, seriously annoying or intolerable.’ ” (*Id.* at p. 303.) Second, the plaintiff must prove that the interference with the protected interest is unreasonable, defined as “ ‘of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of land.’ ” (*Ibid.*)

Brownstein alleges that the Smiths knew the Hubers used their air space for occupancy and fed hot water from their water heater into that airspace surreptitiously to deceive the City of Los Angeles, and that by executing the settlement agreement approving occupancy of the airspace before the City approved it, the Smiths furthered this nuisance and violated City of Los Angeles codes. This does not show a substantial, unreasonable invasion of Brownstein’s use and enjoyment of her property. Brownstein provides no authority that another property owner’s violation of city codes constitutes a

private nuisance, where the code violations do not interfere with Brownstein's use and enjoyment of her own property.

A conspiracy to commit private nuisance, moreover, requires (1) formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant to the conspiracy; and (3) resulting damage. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) No cause of action for conspiracy exists unless the pleaded facts show some wrongful act that would support a cause of action without the conspiracy. (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541.) Because Brownstein's proposed amendments do not allege the tort of private nuisance, the conspiracy cause of action fails.

We therefore conclude that the order sustaining demurrers without leave to amend should be affirmed.

II. The Appeal From the Grant of Summary Judgment

THE STANDARD OF REVIEW

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

FACTS

Undisputed Facts: This is a dispute among four neighbors owning units in the 27 Ketch Street condominium in Marina del Rey. The Hubers own Unit 1 and Hagaman owns Unit 2, the lower units on the property. Brownstein owns Unit 3, and Douglas Smith and Bonnie Smith owns Unit 4, the upper units on the property.

Brownstein and the Smiths sued Hagaman and the Hubers for illegal construction activities within the property, including the lower unit owners' attempts to connect their units to Air Spaces A and B, located directly below Units 1 and 2. After the parties engaged in discovery and mediation, the Smiths entered into a settlement agreement. Brownstein did not settle, and sued the Smiths as unidentified defendants in her complaint against the Hubers and Hagaman.

The 27 Ketch Street condominium project CC&R's give one vote to each member owning one of the four subdivision interests in the project. Section 18(a) of the CC&R's states that the CC&R's may be amended by written consent of members representing 75 percent of the voting power of the homeowners' association.

Hagaman, the Hubers, and the Smiths, comprising 75 percent of the project's voting power, provided written consent to the Second Amendment to the CC&R's.

Section 14(c) of the CC&R's states: "(1) A special meeting of the governing body may be called by written notice signed by the president of the Association . . . (2) The notice shall specify the time and place of the meeting and the nature of any special business to be considered, [and] (3) The notice shall be sent to all governing body members and posted in the manner prescribed for notice of regular meetings not less than 72 hours prior to the scheduled time of the meetings." Section 14(a)(2) states: "[N]otice of the time and place of the meeting shall be posted at a prominent place or places within the common area."

Section 1 of the CC&R's creates the "Association," an unincorporated organization consisting of all subdivision interest owners. Section 8 of the CC&R's creates a governing body for the Association, known as the Board of Governors, consisting of four persons who are owners or lessees of individual units.

On March 3, 2006, a special meeting of the governing body was called for March 8, 2006, by written notice signed by Hagaman, Association president. The notice was placed in the project's common area elevator and a copy was delivered to the front door of each unit.

At the March 8, 2006, meeting, Douglas Smith and the two lower unit owners, representing 75 percent of the property's voting power, voted to approve the Second Amendment to the CC&R's. The Second Amendment was recorded in the County of Los Angeles.

The Smith defendants denied committing any of the actions involving placement of water heaters in common areas, illegal installation of bathrooms in Air Spaces A and B, trying to connect Air Spaces A and B to Units 1 and 2, creating holes in common area walls, altering the original condition of Air Spaces A and B, installing locks restricting access to common areas, damaging common areas and Air Space B, or placing furniture, fixtures, and other items in the common area and Air Space B.

Disputed Facts: The Smith defendants alleged they did not improperly exercise exclusive use over any common areas. Brownstein alleged the Smiths exercised exclusive use and control over common areas by the illegally enacted Second Amendment.

The Smiths alleged that they were not treating any portion of Brownstein's Unit 3 as if it were common area. Brownstein disputed this allegation by arguing that the trial court's ruling on the demurrers did not negate an interpretation that the reference in the Second Amendment and the Settlement Agreement to common area closets below the roof referred to a portion of Unit 3.

The Smith defendants alleged that they did nothing wrong at the March 8, 2006, property owners' meeting, and there was no legal basis to rescind or cancel the Second Amendment to the CC&R's. Brownstein disputed this allegation, alleging that the Smiths breached a fiduciary duty by voting their interest as owners of Unit 4 for private consideration as stated in the March 2006 Settlement Agreement, and contracted illegally

to amend the CC&R's in violation of Civil Code section 1355, subdivision (b)(1), which requires 15 to 60 days notice of solicited approval of an amendment to CC&R's.

Plaintiff's Additional Material Facts: Brownstein alleged that no emergency justified holding the March 8, 2006, Association meeting on less than ten days notice in violation of the CC&R's, since the purpose of the meeting was to amend the CC&R's, which could not be done under Civil Code section 1355, subdivision (b)(1) on less than 15 days notice. Brownstein alleged that defendants chose to short-notice the meeting because the Smiths wanted to be paid the \$85,000 they were owed pursuant to the settlement agreement.

Brownstein alleged that the dispute resolution procedure in the settlement agreement, as adopted in the March 8, 2006, meeting, unreasonably failed to permit a member to opt out of the procedure as required by law.

Brownstein alleged that the CC&R's provided that any owner of an individual condominium units could enforce provisions of the CC&R's as equitable servitudes against any other owners.

Brownstein alleged that the settlement agreement stated that the parties agreed, "[i]n consideration of the covenants and mutual promises contained in this Agreement," to the mutual promises that were consideration for the Agreement, including the agreement to vote for the Second Amendment and the various agenda items attached to the Settlement Agreement at the next Association meeting.

Brownstein alleged that the CC&R's define "governing body" as a 4-person Board of Governors elected by cumulative voting, and no such body existed at the property.

Brownstein alleged that owners of units 1 through 4 owned all of the common area.

Brownstein alleged that the Second Amendment was unfair, unreasonable, and improperly discriminatory toward her.

Brownstein alleged that the Smiths and other parties to the Settlement Agreement seized control of the Association for their own benefit, and used that control to harass Brownstein.

Brownstein alleged that Bonnie Smith, as Treasurer of the Association, breached fiduciary duties owed Brownstein.

ISSUES

Brownstein claims on appeal that:

1. The trial erroneously granted summary judgment as to her cause of action for injunctive relief;
2. The trial court erroneously granted summary judgment as to her cause of action for declaratory relief; and
3. The trial court erroneously granted summary judgment as to her cause of action for breach of fiduciary duty.

DISCUSSION

A. Brownstein Has Not Shown She Was Entitled to Injunctive Relief

Brownstein's cause of action for injunctive relief alleged that defendants' actions had caused and would continue to cause irreparable harm to the 27 Ketch Homeowners Association and its members, including Brownstein, which money damages could not compensate, and therefore Brownstein was entitled to an injunction requiring defendants: to remove water heaters in common areas and illegally installed sinks, showers, and toilets in Air Spaces A and B; not to connect Unit 1 to Air Space A and Unit 2 to Air Space B; to replace and repair holes in common area walls to meet code requirements; to return Air Spaces A and B to their original condition; not to exercise exclusive control over any common areas and not to treat any portion of Unit 3 as if it were common area; to remove furniture, fixtures, equipment, storage units and other paraphernalia from the common area and Air Space B; to repair all damage to common areas and Air Space B; to take all necessary steps to rescind acts taken at the March 8, 2006, meeting; and to rescind the proposed Second Amendment.

To obtain injunctive relief, the plaintiff must show that the defendant's wrongful acts threaten to cause irreparable injuries, i.e., those which cannot be adequately compensated in damages. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.)

1. Brownstein Has Not Created a Triable Issue of Fact as to Whether the Smiths Committed Acts Threatening to Cause Irreparable Injuries

The Smith defendants introduced evidence, in the form of declarations by Douglas Smith, that he never installed, and never intended to install, water heaters in common areas or sinks, showers, toilets, or bathrooms in Air Spaces A and B; that he had never attempted, and never intended to attempt, to connect Air Space A to Unit 1 or Air Space B to Unit 2; that he had never created and did not intend to create holes in common areas; that he had not changed and did not intend to change the condition of Air Spaces A or B; that he had not damaged, and did not intend to damage, common areas or Air Space B and was not involved in work done that resulted in orders issued by the City of Los Angeles. Douglas Smith's declaration further stated that except for using a garage storage area granted to him in the Second Amendment to the CC&R's, he had not placed any furniture, fixtures, paraphernalia, or equipment in Air Space B or in common areas. Douglas Smith's declaration stated that based on his personal knowledge of the premises of the 27 Ketch Street condominium project, these allegations related to lower unit owners Hagaman and the Hubers. Douglas Smith further stated that he was not treating, and never intended to treat, any portion of Unit 3 as if it were common area. Bonnie Smith's declaration contained the same statements. Brownstein produced no evidence disputing this evidence. Consequently no triable issue of fact exists as to whether Douglas Smith and Bonnie Smith committed wrongful acts threatening to cause irreparable injuries.

2. Brownstein Has Not Shown That She Was Entitled to Injunctive Relief Because the Second Amendment to the CC&R's Was Illegally Enacted

Brownstein alleged that the Second Amendment to the CC&R's was illegally enacted in several respects, and that by means of this illegally enacted Second Amendment and the March 2006 Settlement Agreement, the Smiths exercised exclusive use and control over the common area. Brownstein also alleged that the illegally enacted Second Amendment and the March 2006 Settlement Agreement made it impossible for the Association to compel compliance with these requirements and by not requiring the

Hubers and Hagaman to restore Air Spaces A and B to their original condition, gave those lower unit owners a “blank check” to try to get approval for connection of the Air Spaces to their units and allowed current illegal conditions to persist indefinitely.

*a. Brownstein Has Not Shown That She Was Entitled to Injunctive Relief
Because of a Violation of Notice Requirements in Civil Code Section 1355,
Subdivision (b)*

Brownstein claims that the Second Amendment to the CC&R’s failed to give notice in violation of Civil Code section 1355, subdivision (b). Civil Code section 1355, subdivision (a), however, states: “The declaration may be amended pursuant to the governing documents or this title. Except as provided in Section 1356, an amendment is effective after (1) the approval of the percentage of owners required by the governing documents has been given, (2) that fact has been certified in a writing executed and acknowledged by the officer designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association, and (3) that writing has been recorded in each county in which a portion of the common interest development is located.” Thus if the amendment to the declaration proceeds pursuant to the governing documents, requirements in Civil Code section 1355, subdivision (b) do not apply.

It was undisputed that Section 14(c) of the CC&R’s provided that the Association president could call a special meeting of the governing body by written notice, specifying the time and place of the meeting and the nature of special business to be considered, sent to all governing body members and posted in the manner prescribed for notice of regular meetings not less than 72 hours before the scheduled time of the meeting. It was undisputed that Section 14(a)(2) of the CC&R’s required posting of the notice of the time and place of the meeting at a prominent place within the common area. It was undisputed that written notice by Hagaman, president of the Association, called for a special meeting of the governing body, and this notice was placed in the property’s common area elevator, where Association notices had been posted for several years, and that a copy of the notice was delivered to each Unit’s front door. Although Brownstein alleged that

there was no governing body, Section 8 of the CC&R's created a governing body for the Association called the Board of Governors, and that the Board of Governors consisted of four persons who are owners or lessees of individual units. Thus as stated in Section 1 of the CC&R's, the Board of Governors was identical to the Association, consisting of all subdivision interest owners.

It was undisputed that Section 18(a) of the CC&R's provided that the CC&R's may be amended by the written consent or by vote of 75 percent of the Association's voting power, and that the lower unit owners and Douglas Smith, comprising 75 percent of the Association's voting power, did provide written consent to and did vote in favor of the Second Amendment.

Thus although Brownstein claims she is entitled to injunctive relief to remedy the Smiths' violation of statute in amending the CC&R's, no violation of Civil Code section 1355, subdivision (b) occurred. Because the governing document—the CC&R's—provided a procedure to amend the declaration, the procedure in Title 6, Part 4, Division 2 of the Civil Code did not govern the amendment. Brownstein created no triable issue of fact that the amendment was illegal because of a statutory violation. Thus Brownstein was not entitled to injunctive relief.

b. Brownstein Has Not Shown That She Is Entitled to Injunctive Relief to Force Future Compliance With Civil Code Section 1355, Subdivision (b)

Brownstein claims she is entitled to injunctive relief to enforce the CC&R's and to prevent future short-noticed “pseudo-emergency” meetings. Her theory is that Civil Code section 1355, subdivision (b) required at least 30 days notice before amendments to CC&R's could occur. This argument (1) misstates the notice requirements in section 1355, subdivision (b), and (2) overlooks that Civil Code section 1355, subdivision (b) does not apply where a declaration may be amended pursuant to governing documents (*id.* at subd. (a)). Brownstein has not shown that she is entitled to this injunctive relief.

c. *Brownstein Has Not Shown She Was Entitled to Injunctive Relief Because of a Violation of Civil Code section 1363.830*

Brownstein claims she is entitled to injunctive relief to remedy the adoption of an unreasonable dispute resolution procedure by members of the Association in violation of Civil Code section 1363.830. Brownstein, in a statement of additional material facts, alleged that the dispute resolution procedure adopted in the Second Amendment to the CC&R's at the March 8, 2006, meeting unreasonably failed to permit a member to opt out of the procedure as required by Civil Code section 1363.830, subdivision (d). Civil Code section 1363.820, subdivision (a) states: "An association shall provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article." Civil Code section 1363.830, subdivision (d), however, clearly states: "If the procedure is invoked by the association, the member may elect not to participate in the procedure." Brownstein claims that because the dispute resolution procedure in the Second Amendment did not provide for the election in Civil Code section 1363.830, subdivision (d), injunctive relief ordering rescinding of this provision is required. It is not. Civil Code section 1363.830, subdivision (d) provides independent, statutory ground for a member to elect not to participate in the procedure.

d. *Brownstein Did Not Create a Triable Issue of Fact That the March 8, 2006, Association Meeting Did Not Comply With Notice Provisions in the CC&R's*

Brownstein claims that defendants incorrectly rely on Civil Code section 1363.05, subdivision (h), but this statute requires the association board of directors to permit an association member to speak at any association meeting, subject to a reasonable time limit. Thus it has no application to this appeal.

It appears that Brownstein may refer instead to subdivision (g) of Civil Code section 1363.05, which authorizes the association president, or any two members of the governing body other than the president, to call an emergency meeting of the Board. Brownstein argues that the CC&R's define the governing body as a four-person Board of Governors elected by cumulative voting, and that no such body existed at the 27 Ketch Street project. Section 8 of the CC&R's, however, creates a governing body for the

Association to be known as the Board of Governors, and states: “The Board of Governors shall consist of four (4) persons who are owners or lessees of individual units.” Thus the Board of Governors and the voting members of the Association are co-extensive, one and the same. Brownstein argues that the March 8, 2006, meeting was a meeting of the homeowners and was illegal because it did not comply with the notice requirements of CC&R section 13(d), which requires ten days notice of any regular meeting. Section 14(c)(1) of the CC&R’s, however, states that a special meeting of the governing body—which comprises the voting members of the association—may be called “by written notice signed by the president of the Association or by any two members of the governing body other than the president[.]” Section 14(c)(3) states: “The notice shall be sent to all governing body members and posted in the manner prescribed for notice of regular meetings not less than 72 hours prior to the scheduled time of the meetings.” Brownstein introduced no evidence that the notice provision was not complied with.

e. Brownstein Has Not Created a Triable issue of Fact Regarding the Application of Civil Code Section 1363.07, Subdivision (a)

Brownstein argues that the Smith defendants cannot rely on Civil Code section 1363.07, subdivision (a), which states, in relevant part: “(a) After an association acquires fee title to, or any easement right over, a common area, unless the association’s governing documents specify a different percentage, the affirmative vote of members owning at least 67 percent of the separate interest in the common interest development shall be required before the board of directors may grant exclusive use of any portion of that common area to any member[.]”

Brownstein argues that the association never acquired an easement or fee interest in the common area, which is owned by the owners of units 1 through 4, and therefore Civil Code section 1363.07, subdivision (a) has no application. In the summary judgment proceeding, Brownstein has provided no evidence that the Association did not acquire an easement or fee interest in the common area or that ownership of the common area is held

in some other way or by some other owner.² Thus Brownstein has not created a triable issue of fact concerning the applicability of Civil Code section 1363.07, subdivision (a).

f. Brownstein Has Not Shown a Triable Issue of Fact Regarding Defendants' Reliance on California Code of Regulations, Title 10, Section 2792.24

Brownstein claims that the Smith defendants erroneously rely on California Code of Regulations, Title 10, section 2792.24, because that regulation only applies to projects with five or more condominium units. Brownstein is incorrect. California Code of Regulations section 2792.24 contains no such limitation.

3. Brownstein Has Not Shown She Is Entitled to Injunctive Relief Based on Breach of Fiduciary Duty

Brownstein claims she is entitled to injunctive relief because the Smiths breached fiduciary duties owed to her in voting to enact the Second Amendment and in adopting the flawed dispute resolution procedure at the March 8, 2006, association meeting.

Brownstein claims that persons who control a homeowners association are fiduciaries with respect to members and may not exercise that control for their private benefit. Brownstein cites *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783 (*Raven's Cove*) for this principle. In *Raven's Cove*, a homeowner's association sued the developer and its employees as former directors in control of the association for breach of fiduciary duty for failing to determine operating costs and fund a maintenance reserve account during the period before control of the association was turned over to the homeowners. (*Id.* at p. 787.) Until that turnover, all directors of the association were owners or employees of the developer. During this period, the association of directors had a fiduciary relationship to homeowner members analogous to that of a corporate promoter to shareholders. By failing to assess each unit for an adequate reserve fund and by acting with a conflict of interest, the developer-

² Brownstein's statement of additional material facts alleged that all of the common area was owned by owners of units 1 through 4, and cited the declaration of Douglas Smith as evidence of this allegation. Douglas Smith's declaration contains no such statement.

directors abdicated their obligation to establish such a fund for maintenance and repair. *Raven's Cove* held that individual initial developer-directors were liable to the association for breach of fiduciary duties of acting in good faith and exercising basic duties of good management. (*Id.* at pp. 800-801.) *Raven's Cove*, however, is factually distinguishable from this appeal, which does not involve owners or employees of a developer acting as directors of a homeowners' association in the period before the developer turns control of the association over to the homeowners.

“Directors of nonprofit corporations such as [a homeowners' association] are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. [Citation.] This fiduciary relationship is governed by the statutory standard that requires directors to exercise due care and undivided loyalty for the interests of the corporation.” (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513.) Thus directors of a homeowners' association owe this duty to the corporation. In entering into the Settlement Agreement, Douglas Smith did not act as a director of the association. In voting to approve the Second Amendment to the CC&R's, Smith acted as a member of the association, not as a director. The complaint alleges no more than that Smith, the Hubers, and Hagaman control a three-quarter majority of votes of the 27 Ketch Homeowners Association. It does not allege that Smith (or the other homeowner defendants) acted as directors of the association, and Brownstein provided no evidence in opposition to the summary judgment motion that Smith or the other homeowner defendants acted as association directors. There is no authority for imposing a fiduciary duty, owed by Douglas Smith or Bonnie Smith voting as association members, to Brownstein as another association member, under these circumstances. Therefore Brownstein is not entitled to injunctive relief because of Douglas Smith's breach of fiduciary duty.

B. Conclusion

We find no error in the trial court's grant of summary judgment in favor of the Smith defendants as to the cause of action for injunctive relief.

Brownstein makes no additional arguments concerning her entitlement to declaratory relief or that the trial court erroneously granted summary judgment on the cause of action for breach of fiduciary duty. We therefore affirm the grant of summary judgment on all causes of action.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants Douglas Smith and Bonnie Smith.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.